In The
Supreme Court Of The United States

OCTOBER TERM, 1982

No._____

RALPH POMPANO
Petitioner

v.

MICHAEL SCHIAVONE & SONS INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS INC.,
Respondents

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 788—August Term, 1981

(Argued March 29, 1982 Decided June 4, 1982)

Docket No. 81-7841

RALPH POMPANO,

Plaintiff-Appellant,

—v.—

MICHAEL SCHIAVONE & SONS, INC. and REVISED PENSION PLAN OF MICHAEL SHIAVONE & SONS, INC.

Defendants-Appellees.

Before:

KAUFMAN, MANSFIELD and CARDAMONE,

Circuit Judges.

Appellant Pompano commenced an action for claimed violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* when upon retire-

ment from appellee, Michael Shiavone & Sons, Inc., he was denied pension benefits in a lump sum. He appeals from the judgment which dismissed this action, entered in the United States District Court for the District of Connecticut, Burns, *J.*, following a bench trial.

Affirmed. Judge Mansfield dissents in a separate opinion.

WILLIAM H. CLENDENEN, JR., New Haven, Connecticut (Clendenen & Lesser, New Haven, Connecticut, on the brief), *for Plaintiff-Appellant.*

SHAUN S. SULLIVAN, New Haven, Connecticut (Patrick M. Noonan, Wiggin & Dana, New Haven, Connecticut, on the brief), *for Defendant-Appellees.*

CARDAMONE, *Circuit Judge:*

Appellee Michael Schiavone and Sons, Inc. ("Schiavone") had a pension plan for the benefit of its employees, one of whom was appellant Ralph Pompano. When Pompano reached retirement age (65) after 36 years as an employee of Schiavone, he sought a single lump sum payment which, under Article IV § 2 of the plan, was one of the optional modes of settlement a participant could elect "[i]n lieu of the normal pension to which he would otherwise be entitled." The plan provided

that the lump sum option was available only with the "prior approval of the [Pension] Committee."

When the plan became effective in 1972, all of Schiavone's employees were given a pamphlet which explained its major provisions in simple terms. The pamphlet made clear that the lump sum option was available "only with the permission of the Committee." Pompano's request for a lump sum payment was considered by the Committee ("Committee") and denied. He retired December 31, 1975, was awarded and is presently receiving monthly pension payments of $296.83.

In March 1976 Pompano commenced the instant action against Schiavone and the Revised Pension Plan of Michael Schiavone & Sons, Inc. ("Plan"), for: damages for claimed violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*; release of his pension benefits in a lump sum, and for costs and attorneys fees. A bench trial was had on September 23, 1980 before the United States District Court for the District of Connecticut, Ellen B. Burns, Judge, which resulted in a judgment dated October 23, 1981 in favor of appellee dismissing the action. From that judgment this appeal is taken.

At issue is the Committee's range of discretion in the awarding of pension benefits, the procedures used by the Committee in exercising that discretion and whether Schiavone discriminated against appellant by not inviting him to a dinner for retiring employees.

I

This appeal raises questions the answers to which can be found only after an analysis of ERISA. To construe a statute we look first to the words actually used by the drafters, remembering that words are but signs that point

to ideas. We may also examine the statute's legislative history to ensure that the meaning we have ascribed to these words fits their purpose, as that was what Congress intended. Legislators' expectations in creating laws are best described in Shakespeare's aphorism "I endow'd thy purposes with words that made them known."[1] *See,* Note, *Intent, Clear Statements, and The Common Law: Statutory Interpretation In The Supreme Court,* 95 Harv. L. Rev. 892 (1982).

ERISA provides that a "summary plan description of any employee benefit plan" must be furnished to participants and must be "written in a manner calculated to be understood by the average plan participant, . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1) (1976). The Plan, which made a lump sum payment available only with prior approval of the Committee, was written up in summary form in simple and unmistakable language easy enough for the average plan participant to be reasonably apprised of his rights and obligations under the Plan.

Included in the specific information which the summary of the plan must contain is a description of the "circumstances which may result in disqualification, ineligibility, or denial or loss of *benefits.*" 29 U.S.C. § 1022(b) (1976) (emphasis supplied). As the emphasis illustrates, and as the policy of Congress—"many employees with long years of employment are losing anticipated retirement benefits," 29 U.S.C. § 1001a (1976 & Pub. L. No. 96-364, § 3, 94 Stat. 1208, 1209 (1980))—makes plain, the

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[1] W. Shakespeare, *The Tempest,* Act 1, scene ii, *reprinted in The Complete Works of Shakespeare,* (W. Craig ed. 1928).

focus of concern with circumstances that might cause a participant or beneficiary not to receive benefits. The summary of the Schiavone Plan included all that ERISA requires.

It is appellant's contention, however, that there existed a secret, unwritten rule which he claims violated section 1022(a)(1) because it denied lump sum benefits to long term employees. While it might appear plausible to argue that the summary should have enumerated the factors to be considered by the Committee in making its determinations, such a requirement would defeat the purpose of a summary, i.e., a brief restatement. Such argument would also find little or no support in ERISA or its legislative history.

No specific mode of payment is provided for in ERISA. The policy considerations underlying the statute mandate the setting of standards only as to the fiscal soundness of a plan. 29 U.S.C. § 1001a. To accomplish that objective, standards of conduct, responsibility and obligation are imposed on the fiduciaries who control and manage each plan. They are required to act with the care and diligence of a "prudent man," *id.* at § 1104(a)(1)(B) (1976), and subject themselves to personal liability for a breach of that fiduciary duty, *id.* at § 1109(a) (1976). A reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans. *See* H.R. Rep No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038-5165. Thus the plan must specify the basis on which payments are to be made to participants and beneficiaries, U.S. Code Cong. & Ad. News at 5078, so as to meet the legislative purpose of having each participant know exactly where he stands

with respect to the plan. *See*, H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649. This requirement is not intended, however, to undercut the flexibility essential to effective and responsible financial management of the plan which Congress intended when it adopted for ERISA fiduciaries the "prudent man" standard. U.S. Code Cong. & Ad. News at 5083 (1974).

The trial court found no bad faith or arbitrariness on the part of Schiavone based on its denial of the lump sum payment to Pompano. The Plan's lump sum option was never granted lightly. The evidence showed that the Plan's actuaries had, in 1972, advised the Committee not to make lump sum payments for three reasons: first, Plan assets might have to be sold in order to pay large lump sum amounts; second, free availability would complicate long term investment strategy; and third, such payments invalidate long term mortality assumptions. The Committee had previously granted some lump sum requests, but only where the requesting employee's lump sum payment was less than $3,000. Such did not constitute a drain on the fund and the minimal monthly payments on such a small vested amount would not have met the major purpose of the plan—assurance of a monthly income that one can retire on—and would have been a bookkeeping nuisance. An actuary testified that plaintiff's lump sum option amounted to $38,172,[2] well over the $3,000 preclusion level set by the Committee. Concededly, the actuary testified that he did not know if there would have been any *actual* monetary loss to the Plan, whose assets were then $1,252,000, if the plaintiff had been granted the

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2 Presumably, at current interest rates the monthly income on that amount would be appreciably more than the monthly benefits Pompano now receives.

lump sum amount. The trial court also found that the lump sum option was rarely granted; e.g., there was evidence that a company executive also had his request for a lump sum distribution turned down at approximately the same time as appellant. However, the court found that the Committee did not follow an arbitrary path, but instead listened to advice from its actuaries in formulating this policy.

Appellant's request could be detrimental to the other beneficiaries of the Plan and the Committee owed a fiduciary duty to them (as well as to appellant) to insure a stable retirement fund. 29 U.S.C. §§ 1101-1114 (1976 & Pub. L. No. 96-364, 94 Stat. 1208 (1980)); *see also*, 29 C.F.R. 2550.404a-1 (1981). Such an amount, singly or in combination with other lump sum requests, can reasonably be said to be capable of having an adverse impact on the three factors mentioned in the actuaries' 1972 report and it was a matter entrusted to the Committee in their discretion to grant or deny this request.

We have stated that when a pension committee is acting within the law its discretionary acts should not be disturbed, absent a showing of bad faith or arbitrariness. *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977). The appellant is entitled to his benefits and is indeed receiving them but he had no absolute right under the Plan to the specific mode of payment that he requested. The trial court found that the trustees were not acting arbitrarily or in bad faith in denying this pensioner his lump sum request; additionally, there was no bad faith attempt by the trustees to confuse or mislead any Plan participants as to the lump sum distribution option. The plaintiff had notice of the fact that the lump sum option was at the discretion of the Committee and the trial court found such notice reasonably apprised appellant of his

rights under the Plan. These findings are not clearly erroneous.

II

Other errors that appellant claims were made by the Committee involved the failure of the trustees to observe certain procedural requirements of both ERISA and the company Plan, to wit: failure to send appellant a written notice of the denial of his claim (29 U.S.C. § 1133(1) (1976)), failure to give him an opportunity for review (29 U.S.C. § 1133(2) (1976)), failure to keep adequate records (29 U.S.C. § 1059(a)(1) (1976)); and failure to provide for arbitration of the dispute as the Plan requires.

The plaintiff argued that he should have been given notice in writing when the requested lump sum distribution was denied. Title 29 U.S.C. § 1133(1) specifically provides for written notice to a plan participant whose benefit claim is denied. The trial court held, however, that no benefits were denied plaintiff. Rather it was only the requested *mode* of distribution of these benefits that was denied to him; that denial was explained to him orally.

A reading of ERISA, together with its legislative history, supports the finding of inapplicability of § 1133(1) and (2) to this case. There is strong evidence to suggest that the procedural protection set forth in the statute is intended to safeguard the participants substantive rights to receive benefits. The House Conference Report explains that § 1133 was included as a compromise means of requiring procedures for resolving certain disputes between the plan administrator and participants. The House Bill contained no such provision and the Senate bill provided for review and arbitration of any dispute. The final compromise version only covers denial of a "claim for benefits." H. R. Rep. No. 93-1280, 93d Cong.,

2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5108. One of the Senate Managers of the Act, reporting to the Senate on the conference agreement stated that "prior to bringing an *action to recover benefits* from the plan the participant . . . would have the right to receive written notice . . . of the special reasons his claim *for benefits* was denied; and, in addition, would be entitled to full and fair review . . . of the decision to deny *such benefits.*" (emphasis supplied).

Another piece of evidence indicating that the thrust of the statute is the safeguarding of benefits is the establishment of the Pension Benefit Guaranty Corporation whose function it is to insure the timely and uninterrupted payment of benefits. 29 U.S.C. § 1302(a) (2) (1976). It is abundantly clear therefore that the purpose Congress had in mind was to provide safeguards to participants for the payment of their benefits. Neither the Act nor its legislative history comments on the mode or manner in which benefits should be paid. We do not intend to imply that the form which payment of benefits takes may never be such as to constitute a substantive denial of ERISA benefits. Appellant, however, is receiving his rightful due in monthly distributions. The inescapable conclusion is that the denial of the particular method of payment requested in this case did not, on the facts, constitute a denial of a "claim for benefits," and thus did not necessitate written notice and fair review under either § 1133(1) or (2).

Appellant's arguments with respect to arbitration and the failure of the Committee to keep written records are unavailing. The Plan itself expressly excluded from arbitration Committee decisions regarding the mode of benefit payments. As to record keeping there is no causal relationship between the conceded failure of the Commit-

tee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit. The decision to deny appellant's request and the reason for it were communicated orally to him by the Committee.

III

The last contention made is that Schiavone discriminated against Pompano by not inviting him to attend a company dinner honoring other retirees. It is unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right" under a pension plan of ERISA. 29 U.S.C. § 1140 (1976). The trial court found that the reason appellant was not invited to the company dinner was not because he had exercised his rights, but because the acrimony which had developed caused the company's officers reasonably to apprehend that if he attended, an unpleasant incident would occur ruining the dinner for those invited.

The trial court further found an absence of discrimination in the fact that although appellant was scheduled to retire on April, 1975 (the date of his 65th birthday), he requested and was twice granted postponements of retirement so that he did not actually leave employment until the end of December. The reason for this was to ameliorate the hard feelings engendered by the decision made on the pension benefits.

In our view it strains credulity to believe that the reach of § 1140 extends so far as to include a failure to invite a participant or beneficiary of a plan under ERISA to an employer sponsored social event. This section is designed to prevent "unscrupulous" employers from discharging or harassing plan participants in order to keep them from

realizing their vested pension rights. *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980).

In any event, these findings of fact made by the district court on this claim were not clearly erroneous.

An award of attorneys' fees was not made in the lower court and is not warranted on this appeal.

The judgment is affirmed.

MANSFIELD, *C.J.* (Dissenting):

I respectfully dissent. In my view the Schiavone pension plan violated ERISA in several significant respects, most notable of which is its representation that a single lump sum payment was available to all retirees with Committee approval when in fact Schiavone had a firm undisclosed rule prohibiting such payments to long-term retirees, of whom the plaintiff was one. The Act specifically authorizes a person in plaintiff's position to bring an action for relief against these violations, regardless whether benefits have been denied, as a means of insuring compliance with the Act's full disclosure requirements.

The majority starts out on the erroneous premise that "[a]t issue is the Committee's range of discretion in the awarding of pension benefits [and] the procedures used . . . in exercising that discretion," Maj. Op. p. 2, *supra.* It then proceeds to defend at length the denial of the lump sum payment as an exercise of discretion not based on bad faith or arbitrariness but grounded on sound economic considerations. The issue before us, however, is not the soundness of the Committee's exercise of discretion.[1] Nor is the economic basis or wisdom of a policy

[1] Even if the Committee's exercise of discretion were an issue, there is no evidence that the denial of lump sum benefits to plaintiff in this case involved a particularized determination by the Committee not to grant his request.

against lump sum payments being challenged. The issue is whether the Schiavone plan summary complied with ERISA's express requirement that it be materially accurate. The answer is that the summary, by failing to disclose an "unwritten general rule" against lump sum payments to long-term retirees, which was found by the district court to exist and is not disputed by the majority, was misleading and therefore violated the Act.

Section 502 of the Act, 29 U.S.C. § 1132, entitled "Civil enforcement," enpowers any participant or beneficiary to enforce rights created by ERISA, whether or not a loss or denial of benefits is involved. Subsection (a)(1)(B) authorizes a suit by a participant

> "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

In addition, subsection (a)(3) permits private actions to enforce a plan's compliance with its own terms or with the requirements of the Act, authorizing suits

> "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Subsection (c) further provides that a participant may sue an administrator for $100 per day for failing to provide "any information" he is required to furnish, except when excused by "reasons beyond the control of the administrator." 29 C.F.R. § 2520.102-3(t)(2). These compliance

suits are expressly not conditioned on a loss or denial of benefits; indeed, they may proceed even where the plaintiff is not claiming any benefits.[2] In addition, participants may also sue an administrator for violation of his fiduciary duties under §§ 401 to 414 of the Act, 29 U.S.C. §§ 1101 to 1114, without showing any denial or loss or claim of benefits.[3] These provisions effectuate Congress' clear intention that ERISA's requirements be applicable and enforceable by private suits independent of any claim for benefits, in order to provide participants with broad and expansive rights and remedies for redressing or preventing violations of the Act.[4]

The Schiavone plan summary stated that the lump sum payment option was available to all participants subject to the Committee's approval. In reality, however, under the "unwritten general rule" long-termers and retirees were ineligible for the option. This ineligibility appears

2 See, e.g., *Lechner v. National Benefit Fund for Hospital and Health Care Employees*, 512 F. Supp. 1220 (S.D.N.Y. 1981) (suit by non-claimant to prevent possible future violations); *International Ass'n of Bridge, Etc. v. Douglas*, 646 F.2d 1211 (7th Cir. 1981) (suit under 29 U.S.C. § 1132(a)(1)(B) challenging plan amendment that *might* affect unspecified future participants); *Corley v. Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982) (misleading plan summary violates disclosure requirements of 29 U.S.C. § 1022(a)(1); *Janowski v. International Brotherhood of Teamsters Local No. 710*, 500 F. Supp. 21 (N.D. Ill. 1980) (challenging various aspects of new plan).

3 See, e.g., *International Ass'n of Bridge, etc. v. Douglas, supra; Morrisey v. Curran*, 567 F.2d 546 (2d Cir. 1977) (seeking liquidation of unsound investment); *Corley v. Hecht Co., supra* (prohibiting financial transactions between fiduciary and plan).

4 See H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4655; S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4871. See also *Lechner v. National Benefit Fund for Hospital and Health Care Employees, supra*, 512 F. Supp. at 1221-22 & n.6; *Kulchin v. Spear Box Co. Retirement Plan*, 451 F. Supp. 306, 311 (S.D.N.Y. 1978); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271, 274 (E.D. Pa. 1977).

nowhere in the plan summary. The plan therefore violates § 102(b) of the Act which requires a plan summary to describe all the

> "circumstances which may result in disqualification, ineligibility, or denial of benefits . . . ." 29 U.S.C. § 1022(b).

The majority, focusing on the phrase "of benefits," suggests that the disclosure requirements does not apply to a plan's mode of payment. Such a narrow reading cannot be squared with other provisions of the Act, regulations promulgated thereunder, and Congress' intent. Section 2(b) of the Act declares that the "policy of this Act" is to require "the disclosure and reporting to participants and beneficiaries of *financial and other information* with respect to the plans," 29 U.S.C. § 1001 (emphasis added), and § 102(a)(1) of the Act requires the summary to be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). These unqualified statements of a broad disclosure requirement reflect Congress' desire to ensure "that the individual participant *knows exactly where he stands* with respect to the plan." H.R.Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4649 (emphasis added).

The full scope of the disclosure policy is further reflected in the regulations. Regulation § 2520.102-2(b) provides in part that

> "the summary plan description must not have the effect to [sic] misleading, misinforming or failing to inform participants and beneficiaries. [Any] excep-

tions, limitations, reductions, or restrictions of plan benefits shall be described or summarized . . . 29 C.F.R. § 2520.102-2(b). See also 29 C.F.R. § 2520.102-3(t)(1)."

The summary must "clearly identify circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits," 29 C.F.R. § 2520.102-3(1), which encompasses "claims which are denied in whole or in part." *Id.* at subsection (s). See also *id.* at subsection (t)(2); 29 C.F.R. § 2560.503-1(e)(1).

Schiavone's unwritten rule, which renders certain participants ineligible for a form of payment that is particularly valuable in times of high interest rates, surely constitutes an exception, limitation, reduction, or restriction of plan benefits which any "accurate and comprehensive" summary must include if a retiring employee is to know "exactly where he stands with respect to the plan." The plan gave the impression that the Committee would exercise discretion with respect to all retirees, including long-termers, whereas in fact it would exercise none in the case of the latter. I would hold, therefore, that Schiavone violated § 102(b) of the Act by failing to disclose in the plan summary the rule that participants with accrued benefits over $3,000 would not be eligible for the lump sum option. See, e.g., *Corley v. Hecht Co.*, 530 F. Supp. 1155, 1163-64 (D.D.C. 1982). A simple statement of the rule would have sufficed; thus the majority's objection to a lengthy enumeration of factors is misplaced. Maj. Op. p. 4, *supra.*

The Schiavone plan also violated the procedural protections provided in § 503 of the Act, 29 U.S.C. § 1133, by failing to give Pompano written notice of his denial and

an opportunity for a full and fair review.[5] The majority limits § 503 to a denial of benefits, and holds that written notice and an opportunity for review are not required for the denial of a requested mode of payment. The rationale for such a distinction escapes me, since the regulations mandate § 503's procedural safeguards whenever "a claim for a (pension, welfare) benefit is denied in whole *or in part.*" 29 C.F.R. § 2520.102-3(t)(2) (emphasis added). The denial of the requested lump sum payment, which clearly reduced the value to Pompano of his pension, certainly constitutes a partial denial of his claim. Moreover, the legislative history of § 503 reveals that Congress was concerned with procedures for resolving and reviewing "*disputes* between the plan administrator and participants or beneficiaries," H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5108 (emphasis added), which would encompass more than the outright denial of all benefits. Finally, § 503 must be interpreted in light of ERISA's strong concern with ensuring strict plan compliance with the Act. Accordingly, I would hold that Schiavone violated § 503 of the Act. See *Frary v. Shorr Paper Products, Inc.*, 494 F. Supp. 565 (N.D. Ill. 1980), where the court held that the wrongful denial of a

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5 Section 503 provides:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133.

participant's request for a lump sum payment of benefits violated "his rights under the terms of the plan" (29 U.S.C. § 1132(a)(1)(B)) and ordered the lump sum payment be made.

Finally, I would also hold that Schiavone's failure to maintain written records, expressly required by the terms of the plan, is a violation of the Act that is actionable under § 502(a)(3), 29 U.S.C. § 1132(a)(3). The majority concedes implicitly that the district court erred in characterizing § 502(a)(3) as merely conferring standing by stating, in an attempt to sidestep this clear violation, that "there is no causal relationship between the conceded failure of the Committee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit." Maj. Op. p.8, *supra*. With all due respect, this explanation, offered without any authority and devoid of any basis in the statute, is unsupportable. As noted earlier, ERISA expressly authorizes compliance suits independent of any claim for benefits, and such suits have been brought, for example, to prevent possible future violations, to challenge various aspects of a new plan, and to object to an amendment to a plan that may affect the future eligibility of unspecified participants. See note 2, *supra*. The majority's holding engrafts onto § 502 a requirement that the alleged violation of ERISA must be "causally related" to some denial of benefits. Because this can be done only by disregarding the clear terms of the Act, is legislative history and existing case law, I decline to follow that course.

In sum, I would hold that the plan summary (1) was deficient in violation of § 102(b) by reason of its failure to disclose the unwritten rule against lump sum payments to long-term retirees, (2) failed in violation of § 503 to provide a written notice of the denial of such payments

and an opportunity for review, and (3) failed in violation of § 502 to maintain written records as required by that section.

As a remedy I would award Pompano his requested lump sum payment, since such an award would further the purposes of the Act to ensure that administrators comply strictly with its provisions. See *Frary v. Shorr Paper Products, Inc., supra,* 494 F. Supp. at 471 (ordering lump sum payment as remedy). In addition, I would award attorney's fees to Pompano's counsel pursuant to 29 U.S.C. § 1132(g)(1) for his services in clarifying and enforcing rights under the Act. See *Landro v. Glendenning Motorways,* 625 F.2d 1344, 1356 (8th Cir. 1980).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed Jul 14 1982

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of July, one thousand nine hundred and eighty-two.

RALPH POMPANO,
Plaintiff-Appellant,

-v-

MICHAEL SCHIAVONE & SONS, INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS, INC.,
Defendants-Appellees.

No. 81-7841

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Ralph Pompano,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Mansfield dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

/s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed Oct 23 '81
U.S. DISTRICT COURT, NEW HAVEN, CONN.

RALPH POMPANO :

v. : CIVIL NO. N 76-87

MICHAEL SCHIAVONE
& SONS, INC. :

MEMORANDUM OF DECISION

Plaintiff sued his former employer and the employer's pension plan[1] to compel payment of his retirement benefits in one lump sum, for damages and attorneys fees. He contends that he was entitled to the lump sum payment but that the pension plan committee, which supervises the plan, deprived him of his right to that payment in contravention of the plan provisions and the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974). There is also a claim of illegal discrimination under that Act.

Trial to the Court was held on September 23, 1980. Based on the facts found in part I of this memorandum and the conclusions of law reached in part II, Fed. R. Civ. P. 52(a), the Court renders judgment for defendants.

I.

Plaintiff Ralph Pompano worked for defendant Michael Schiavone & Sons, Inc., until January 1, 1976, when he retired. As a retired employee of the defendant company, plaintiff was entitled to certain pension payments pursuant to the provisions of the defendant Revised Pension Plan of Michael Schiavone & Sons, Inc., dated March 1, 1972.

The 1972 plan provided that employees who had worked for the defendant company for a certain period of time were eligible to receive a portion of their regular pre-retirement compensation after retirement. These pension payments could be made in any of four ways, but the standard payment was "monthly installments commencing on the date of retirement and continuing for the life of the Participant with 120 monthly payments guaranteed." Plaintiff's Exhibit 2 at 13.

There were three other modes of payment. They were available "with the prior approval of the [pension plan] committee." Plaintiff's Exhibit 2 at 7. One of the options was a single lump sum payment;[2] one was a contingent annuitant plan and the third was a straight life annuity. The plan provided that "[a]ny such optional mode of settlement shall be actuarially equivalent in value to the normal pension otherwise payable."

If an employee elected one of the three optional payment plans within one year of retirement, the pension plan committee could have required the employee to provide evidence of good health. If the employee elected one of the three optional plans, but

then changed his or her mind, the employee could withdraw the election, except that the pension plan committee had to approve the change and could require the employee to submit evidence which the committee would consider to determine if the change would have an adverse effect on the plan assets.

The committee managed the plan. It was required under Section VIII(2) to "keep accurate reports and minutes of all its proceedings and action." The committee was charged to "appoint a Secretary ... [to] keep all records of the meetings and doings of the Committee."

Section VIII(9) stated that

> [t]he action or decision of the Committee taken by it in good faith as to any matter or question arising under the Plan within the power, authority, discretion or control of the Committee shall be final, conclusive and binding upon the Company, all Employers, the Trustee, all Employees and all Participants and Beneficiaries; provided, however, that any such action or decision involving a determination as to eligibility, Normal Retirement Date or the amount of benefits (but not the mode or manner of payment of such benefits) shall, upon the written request of the person affected thereby, be subject to arbitration, in which event the Participant shall select one arbitrator, the Committee shall select a second arbitrator and the two arbitrators so selected shall select a third arbitrator. ...

Plaintiff wanted to elect the lump sum payment. Essentially, the lump sum option was a one-time cash payment equal to the value of the other options, which were payable over time. The lump sum payment was discounted to reflect the present value of the payment

which otherwise would have stretched over ten years or more.

A plan summary, Plaintiff's Exhibit 4, which was "intended to provide [employees] with an easy-to-understand explanation" of the plan provisions, described the lump sum payment option as "equal to the value of your retirement benefit." Plaintiff's Exhibit 4, Para. 15(D). The summary also said "[t]his option is available only with the permission of the Committee." *Id.*

Plaintiff intended to invest the one-time payment in an attempt to earn more income than he would receive in monthly payments. Plaintiff believed that the value of the lump sum option was $40,000, but he could not recall at trial who had told him so.

In late 1974 or early 1975, plaintiff and a "young friend" met with Michael Schiavone and Ron Sader, members of the pension plan committee.[3] Plaintiff requested the lump sum payment. Michael Schiavone told plaintiff that it was unlikely the request would be granted because it was the company's philosophy to insure stable retirement income for employees over time and because a lump sum payment to plaintiff would be against the advice of Pension Services, Inc., which provided administrative aid to the committee. No formal decision as to plaintiff's request was made at that meeting; no records of the meeting were kept.

Plaintiff has no further meetings with the plan committee. Later, the committee decided to deny plaintiff's request. Michael Schiavone also consulted his father about the request and his father concurred in the committee's decision. There were no notes from the committee meeting; no committee secretary had been appointed to keep them. Further, plaintiff was never advised in writing of the decision or the reasons for it,

although the evidence supports the conclusion that he was orally informed. There was no procedure for review of the committee's decision.

The committee made its decision sometime early in 1975. Plaintiff was scheduled to retire on April 1, 1975. At plaintiff's request, his retirement was twice postponed until January 1, 1976. Michael Schiavone testified that this extension was granted so plaintiff would leave the defendant company's employ without hard feelings, in view of the mutual antipathy that had sprung up over the committee's decision: the Court credits this testimony.

Plaintiff was not invited after his retirement to a company dinner which honored retirees and other employees because of Schiavone's fear that some unpleasant incident involving plaintiff would take place and ruin the dinner for everyone. This fear was rooted in the bitter feelings which the committee's decision occasioned and the threat by plaintiff's attorney to commence a lawsuit to compel payment of the lump sum.

Most of the testimony at trial was elicited from Richard E. Brandt, an actuary and vice-president of Pension Services, Inc., the firm which performed certain administrative functions for the defendant plan. One of those functions was to advise the pension plan committee on the actuarial soundness of the plan.

In 1972, Pension Services advised the committee not to make lump sum payments. That recommendation was based on the plan's purpose to provide continuing income for retired employees and the fact that lump sum payments had a potentially adverse affect on the plan assets in three ways. First, in order to pay lump sums, plan assets might have to be sold at a loss; second, free availability of the lump sum option would inhibit long term investment decisions and third, lump

sum payments invalidate long term mortality assumptions.

Nevertheless, some lump sum requests had been granted where the requesting employee's total benefits were not over $3,000. In this connection, at about the same time as plaintiff made his request, another lump sum request by a company executive was also denied.

Mr. Brandt testified that, as far as he knew, plaintiff could have selected any of the three other options and his selection would have been honored. Each of the other options was on the employee option election form, but not the lump sum option.

At about the time of plaintiff's retirement, the plan assets were valued at $1,252,000. Mr. Brandt testified that he did not know if there would have been any loss to the plan if plaintiff's request had been granted. Mr. Brandt also testified that the $40,000 amount plaintiff had in mind was in error; that the value of plaintiff's lump sum option was actually $38,172.

II.

Plaintiff is authorized to bring this action pursuant to 29 U.S.C. §1132(a)(1)(B) and (3)(B)(i). This Court has jurisdiction to entertain it pursuant to 29 U.S.C. §1132(e)(1).

In Section 2 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, Congress found

> that owing to the lack of employee information and adequate safeguards concerning [the operation of employee benefit plans], it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect

> to the establishment, operation, and administration of such plans. . . .

The declared policy of the Act was to protect pension plan participants

> by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1001(b). This Court has broad discretion in fashioning remedial and equitable relief to implement this policy. *See, e.g., Marshall v. Snyder,* 572 F.2d 894, 899, 901-02 (2d Cir. 1978).

Plaintiff claims that the evidence showed four principal violations of the Act. Defendants argue the decisions of the pension plan committee can only be challenged on a showing that the committee denied plaintiff's request in bad faith or arbitrarily, a showing defendants argue has not been made. The committee's discretionary acts should not be disturbed absent a showing of bad faith or arbitrariness, *see, e.g., Riley v. MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977); *Vaughn v. Metal Lathers Local 46 Pension Fund,* 474 F. Supp. 613 (S.D.N.Y. 1979), *assuming* they were in accordance with law.

A.

Plaintiff argues he was illegally misled by Plaintiff's Exhibit 4, which is a summary of the 1972 Pension Plan. Specifically, he contends a statement in the summary that a lump sum payment option was an available benefit choice was inaccurate, since no lump sum

payments were ever made.[4] Failure to disclose this practice is said to violate 29 U.S.C. §1022(a)(1), which provides that plan descriptions "shall be furnished to participants" and "shall be sufficiently accurate and comprehensive to reasonably apprise ... participants ... of their rights and obligations under the plan."[5]

Plaintiff claims he was led to believe that, absent poor health, he might have received a lump sum payment. The truth, as plaintiff sees it, was that the plan was arbitrarily administered according to unwritten policies; that the pension plan committee blindly followed a flat rule laid down by Joseph Schiavone, founder of the company, that lump sums were never to be paid and that, actually, the lump sum option was not an option at all.

Consistent with the declared policy of the disclosure provisions, 29 U.S.C. §1001(b), the legislative history of Section 1022(a)(1) includes repeated references to the need for effective communication of plan contents to employees. The House Report says, "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan [summaries]." H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4646. There is also this: [t]he [summary] would be in such form and detail ... necessary to disclose fully and fairly all pertinent facts." *Id., reprinted in* [1974] U.S. Code Cong. & Ad. News at 4656. The Senate Report says there is a "need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures *[sic]* he must follow to obtain benefits...." S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4863.

There is little case law construing section 1022 (a)(1). *See Peckham v. Board of Trustees*, 653 F.2d 424, 428 N. 7 (10th Cir. 1981) (plaintiffs had no standing to raise issue); *Nostrame v. Consolidated Edison Co.*, 504 F. Supp. 507, 512 (S.D.N.Y. 1980) (no cause of action stated); *Trombly v. Marshall*, 502 F. Supp. 29, 32 (D.D.C. 1980) (failure to state a claim); *see also Wadsworth v. Whaland*, 562 F.2d 70, 74 (1st Cir. 1977).

In *Johnson v. Central States, Southeast and Southwest Areas Pension Fund*, 513 F.2d 1173 (10th Cir. 1975), a panel of the Tenth Circuit noted in dicta that a summary should describe the benefits *and* deficiencies of a pension plan, while ruling that the plan before the court was not "positively deceptive." *Id.* at 1176 (district court decision was clearly erroneous).

The word "accurate" as used in Section 1022(a)(1) incorporates many concepts, but principally one of *clarity*. Understood this way, is the 1972 plan summary "accurate?" In this Court's opinion, it is.

It is quite plain from the evidence that the lump sum option *was* only available with the pension committee's consent, and that consent was rarely given. It is also clear that the committee did not blindly follow an arbitrary path, but instead adhered to a rational rule based on the advice of the plan servicing organization and an internal company policy. In cases where payment of lump sums were made, the general rule did not apply because of the small amount involved. The lump sum option was an option, but only under limited circumstances.

Although plaintiff makes much of the fact that the general rule was an unwritten one, this Court finds that the language of the plan and the summary imported reasonable discretion on the part of the trustees, and that the rule applied by the committee was an exercise of that discretion. Evidence of good health was an

additional prerequisite if option selection was made "within the one-year period preceding the Option Effective Date" or if an option election was cancelled "less than one year prior to the Option Effective Date." *See* Plaintiff's Exhibit 2 at 7.

Plaintiff argues that since the lump sum option was actuarially equivalent to the other three options, it made no difference which plaintiff elected. And since plaintiff's request for any of the three other options would have been granted, he argues this proves the lump sum option was an "illusion." This contention misses the point of Mr. Brandt's testimony: payment of large lump sums would have disturbed certain long term assumptions built into administration of the plan assets. Morever, lump sum payments would have limited long term investment planning.

Defendants were entitled to rely on Pension Services' recommendation regarding the actuarial soundness of the plan and lump sum payments. Similarly, the company policy to insure stable retirement pay was an appropriate consideration. At all events, defendants did not violate Section 1022(a)(1) of the Act; plaintiff was "reasonably apprise[d] ... of [his] rights and obligations under the plan."

B.

Plaintiff also argues the evidence proved a violation of Section 1133(1) and Section 1133(2). The former requires written notice to a plan participant when a benefit claim is denied; the latter requires plans to afford an opportunity for review of such a denial. Defendants argue that Sections 1133(1) and (2), like the whole of ERISA, are protections against Forfeiture of benefits and do not concern the mode of payment.

Neither party has cited to any case where a similar claim has been raised. Plaintiff cites *Baeten v. Van Ess*,

474 F. Supp. 1324 (E.D. Wis. 1979) for the proposition that fundamental fairness is implicit in Section 1132 of the Act as well as explicit in Section 1133. He argues that he was afforded no procedural fairness at all.

Baeten is substantially different from the instant case. Plaintiffs in *Baeten* lost their retirement benefits after a decision which the district court characterized as arbitrary because it had been made in a factual vacuum. 474 F. Supp. at 1327.

The evidence at trial in this case established that two meetings were held regarding plaintiff's request. At the first, Michael Schiavone and Ron Sader discussed the request with plaintiff and his friend, telling them the request was not "feasible." At a later meeting of the committee, the request was denied. No written notice of the committee action was sent, but plaintiff was notified of the denial.

Under the '72 plan, there was no provision for review of a committee decision denying a particular option election. There was a provision for submission of a decision of forfeiture to arbitration. *See* Plaintiff's Exhibit 2, §VII(2)(b). There was also a provision for arbitration regarding committee decisions on eligibility, normal retirement date and the amount of benefits, but that provision specifically excepted arbitration of committee decisions about the mode or manner of benefit payments. *See* Plaintiff's Exhibit 2, §VIII(9).

The legislative history of Section 1133 is brief. The House bill did not include Section 1133. The Senate bill provided for arbitration of disputes between plan administrators and beneficiaries. As enacted, Section 1133 was the result of compromise in a joint conference committee. According to the committee report,

> [u]nder the conference agreement every employee benefit plan is required to provide adequate

> notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for denial written in a manner calculated to be understood by the participant. In addition, the plan administrator is required to afford a reasonable opportunity to any participant or beneficiary whose claim for benefits has been denied for a full and fair review of this decision by the plan administrator.

House Conf. Rep. No. 93-1280, Joint Explanatory Statement of the Committee of Conference, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5108.

The Court is persuaded by defendants' argument that the language of Section 1133, which refers to a plan participant "whose claim for benefits ... has been denied," does not cover plaintiff, whose claim for benefits was honored, but not in the form he preferred. A reading of the Act as a whole supports this conclusion. For example, the Pension Benefit Guaranty Corporation was established to insure payment of benefits. *See* 29 U.S.C. § 1302(a). Minimum Funding standards were enacted to insure an adequate base for payment of benefits. *See* 29 U.S.C. §§1082-1085. Employers are required to furnish requesting participants with information on "total benefits accrued." *See* 29 U.S.C. §1025(a)(1). Nowhere in the Act did Congress narrow its focus to the *form* of benefit payments; instead, it concentrated on safeguards for plan participants in relationship to benefits as a whole. *See also* H. Rep. No. 93-533, 93d Cong. 2d Sess. Section 111(c), *reprinted in* [1974] U.S. Code, Cong. & Ad. News 4639, 4644; 29 C.F.R. §2560.503-1 (1980). For these same reasons, Section 1133(2) relating to appeal from a denial of benefits does not apply.[6]

Even assuming Section 1133 did apply to the plan committee's decision not to give plaintiff the requested lump sum, the Court is unable to say a failure to provide written notice would *ipso facto* entitle plaintiff to an equitable decree directing payment. At most, damages might be appropriate, *but cf. Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (punitive damages not recoverable under the Act), but none were proved. An injunction directing compliance might have been in order had there been any proof of a continuing course of conduct. Plaintiff is entitled to no relief on this claim.

C.

Plaintiff's third claim is that defendants failed to perform certain recordkeeping duties. Section VIII of the '72 plan provided a "blueprint" for committee action. *Inter alia*, Section VIII dealt with committee membership, compensation and duties. Part of Subsection 2 read: "[t]he Committee shall keep accurate reports and minutes of all its proceedings and action." Subsection 4 required the committee to "appoint a Secretary who . . . shall keep all records of the meetings and doings of the Committee." There was also a provision in subsection 6 which allowed committee action to be taken in writing rather than at a meeting.

At trial, Michael Schiavone admitted that the committee had no secretary, that he had never kept minutes of meetings, that there were no records or notes from any meetings with plaintiff and that he did not know who was responsible for keeping records.

Plaintiff argues that Schiavone's testimony proves a violation of Sections 1059(a)(1) and 1132(a)(1)(B). Plainly, the evidence does not support a violation of Section 1059(a)(1), which requires employers to keep records "sufficient to determine the benefits due . . . employees."

As to Section 1132(a)(1)(B), plaintiff contends that the language, "[a] civil action may be brought by a participant ... to enforce his rights under the terms of the plan," makes breach of a plan provision a violation of federal law. That extraordinary reading of Section 1132(a)(1)(B) is unsupported by any authority and, in the opinion of this Court, is unsound.

No doubt Congress intended that individual participants should be able to sue to protect their retirement benefits. This is clear, since in Section 1132(a)(3), individual participants are authorized to bring actions almost as though they were private attorneys general. Under Section 1132(a)(3), plaintiff might arguably have obtained an injunction requiring defendants to keep records if there had been any evidence of a present violation. Nothing in Section 1132(a)(1)(B), which by its plain language only grants standing to sue, suggests however, that violation of a plan provision such as those admitted here should be considered a violation of federal law.

D.

Plaintiff's final argument is that defendants unlawfully discriminated against plaintiff within the meaning of Section 1140 of the Act when they did not invite him to an annual company dinner. Defendants contend that Section 1140 does not reach plaintiff's claim.

Michael Schiavone testified that the company dinner was for all employees and that it was not company practice to have individual retirement dinners. Retirees were honored at the company dinner, but years of service awards were also given. The Court credits Mr. Schiavone's testimony that plaintiff was not invited to the dinner because of the mutual antipathy that had sprung up after the lump sum request was denied. Mr. Schiavone testified that harsh words had been exchanged and that it was evident a law suit would be

filed; he said that under these circumstances, plaintiff was not invited for fear that some incident which would spoil the dinner for others would occur.

It is relevant to the discrimination claim that defendants twice postponed plaintiff's retirement date at plaintiff's request so that he would "feel better about the company." Although plaintiff would ordinarily have been terminated after his sixty-fifth birthday in April, he worked until January 1 of the following year.

In *West v. Butler*, 621 F.2d 240 (6th Cir. 1980), a panel of the Sixth Circuit Court of Appeals looked into the legislative history of the non-interference provisions of the Act, Sections 1140 and 1141. The question in *West* was whether appellants had a private right of action under Section 1141; to reach the conclusion that they did not, the court analyzed the relationship between the two sections. *Id.* at 243-45.

The court read Section 1140 as a protection against "unscrupulous employers" who discharged or harassed employees to keep them from obtaining vested pension rights. *Id.* at 245. The court concluded "Congress designed [Section 1140] primarily to protect the employment relationship that gives rise to an individual's pension rights" and held that to violate Section 1140, the individual's employment relationship must be affected in some substantial way.[7] *Id.* at 245-46. *Cf. Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (allegation of discharge to prevent attainment of vested rights stated a cause of action under Section 1140).

In this Court's view, plaintiff failed to prove defendants' failure to invite plaintiff to a social function which was not exclusively for him or retirees in general was discrimination caused by plaintiff's lump sum benefit request. Although plaintiff's request and defendants' failure to invite plaintiff to the company

dinner were incidents in the same series of events, the failure to invite plaintiff to the dinner was not proved to be "*for* exercising [a] right" under the '72 plan; put another way, the alleged "discrimination" was not caused by plaintiff's request for a lump sum payment. Instead, the evidence showed that, despite the hard feelings engendered by the dispute, defendants treated plaintiff favorably by granting him two extensions of his retirement date. The evidence established that the sole reason plaintiff was not invited to the company dinner was concern for others at the dinner. There was no illegal discrimination.

III.

The Clerk is directed to enter judgment for the defendants; plaintiff to take nothing on his complaint. Each party shall bear its own costs. Fed. R. Civ. P. 54(d).

SO ORDERED,

/s/ Ellen Bree Burns
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated: October 23, 1981.

NOTES

[1]*See* 29 U.S.C. §1132(d)(1).

[2]The lump sum option was dropped when the defendant plan was revised in 1976.

[3]Michael Schiavone identified plaintiff's "young friend" in the spectators gallery during trial. He was not identified by name nor did he testify. The only other reference to this "friend" in the record may be in plaintiff's option election form, Defendants' Exhibit C, wherein "Robert T. Irwin — (Friend)" is made plaintiff's beneficiary.

[4]The challenged section of Plaintiff's Exhibit 4 is this:

15. Are There Any Optional Forms of Payment Under The Plan?

While your benefits are calculated on the basic option, you may select either methods *[sic]* of payment. The amount of payment will vary according to the plan you select, but it will be the actuarial equivalent of the basic option. Various choices are outlined below:

D. *Lump Sum*

Under this option, you receive a lump sum equal to the value of your retirement benefit. This option is available only with the permission of the Committee.

[5]The Secretary of Labor has promulgated regulations relating to plan descriptions. 29 C.F.R. §2520.102-1 to .102.4. The regulations were of course issued after this action was filed, but the plan summary nonetheless meets the requirements of the regulations.

[6]Assuming *arguendo* that Section 1133(b) applies to plaintiff's claim, the exemption in Section VIII(9) of the 1972 plan regarding review of decisions as to form of payment would presumably be void. That would raise the question whether plaintiff was obligated to arbitrate his claim to exhaust his interfund remedies. *See, e.g., Amato v. Bernard,* 618 F.2d 559 (9th Cir. 1980).

[7]The *West* court noted the parallel between Section 1140 and Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3). 621 F.2d at 245. To establish an unfair labor practice under Section 8(a)(3), the complainant must show that the employer harbored an unlawful intent. *B.G. Costich & Sons, Inc. v. N.L.R.B.,* 613 F.2d 450, 454 (2d cir. 1980). Insofar as the language of Section 1140 parallels Section 8(a)(3) and includes an intent element, 621 F.2d at 245 (citing remarks of Senator Hartke), there was no evidence at trial to establish such an intent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Filed Oct 23 '81

RALPH POMPANO

vs.

MICHAEL SCHIAVONE & SONS, INC. and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS, INC.

JUDGMENT

CIVIL ACTION
FILE NO. N-76-87

This action came on for trial before the Court, Honorable ELLEN BREE BURNS, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, together with the Court's Findings of Fact and Conclusions of Law, filed on October 23, 1981,

It is Ordered and Adjudged that judgment be and is hereby entered in favor of the defendants dismissing this action and the plaintiff to take nothing on his complaint.

Dated at New Haven, Connecticut, this 23rd day of October, 1981.

SYLVESTER A. MARKOWSKI
Clerk of Court

BY /s/
DEPUTY IN CHARGE

§1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024 (b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions

providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

Pub.L. 93-406, Title I, §102, Sept. 2, 1974, 88 Stat. 841.

§1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

§1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Pub.L. 93-406, Title I, §503, Sept. 2, 1974, 88 Stat. 893.